BEST AVAILABLE COPY

No. 94-984

FILED
JAN 30 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ORLEAN HOPKINS; JERRY DEWAYNE STANCILL; YOLANDA DELYNN STANCILL; and MELBA LAZENBY-JENKINS, as Administratrix of the Estate of JERRY STANCILL,

Petitioners,

v.

MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; and GEORGE T. HART,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAYNE W. WILLIAMS,
City Attorney
RANDOLPH W. HALL,
Assistant City Attorney
City Attorney's Office
City of Oakland
505 -14th Street, 12th Floor
Oakland, CA 94613
Telephone: (510) 273-3566
Facsimile: (510) 238-6500

GREGORY D. BROWN, ESQ.*
STEPHEN Q. ROWELL, ESQ.
JAMES F. HODGKINS, ESQ.
LARSON & BURNHAM
A Professional Corporation
P.O. Box 119
Oakland, CA 94604
Telephone: (510) 444-6800
Facsimile: (510) 835-6666

DAVID R. LUCCHESE, ESQ.
JOSEPH S. PICCHI, ESQ.
ANDERSON, GALLOWAY & LUCCHESE
1676 No. California Blvd., Suite 500
Walnut Creek, CA 94596-4642
Telephone: (510) 943-6383
Facsimile: (510) 943-7542

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should grant a Petition for Writ of Certiorari to consider whether admission of mental health evidence was more likely than not the cause of a District Court jury's verdict in favor of all defenants?

2. Whether this Court should grant a Petition for Writ of Certiorari to consider whether the trial court abused its broad discretionary power by denying Petitioners' Motion to Continue Commencement of Trial?

3. Whether this Court should grant a Petition for Writ of Certiorari to consider whether the law of the case doctrine compelled a District Court Judge to instruct a jury that they must apply the Court's instructions regarding excessive force at two separate points in their deliberations?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 2

LEGAL ARGUMENTS 4

A. The Appellate Court's ruling does not conflict with the Seventh Circuit and is a correct application of the Harmless Error Rule 4

B. Denial of continuance for discovery was within the broad discretionary powers of the trial court and did not result in prejudice to Petitioners 7

C. The law of the case doctrine provides no basis for reversal of the Appellate Court ruling.... 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987) 6

Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985) 5

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 4, 8, 9, 10

Jauregui v. City of Glendale, 852 F.2d 1128 (9th Cir. 1988) 5, 6, 7

Kisor v. Johns-Manville Corp., 783 F.2d 1337 (9th Cir. 1986) 6

Martel v. County of Los Angeles, 21 F.3d 940 (9th Cir. 1994) 7, 8

Martinelli v. City of Beaumont, 820 F.2d 1491 (9th Cir. 1987) 8

Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983) 9

Sablan v. Department of Finance, 856 F.2d 1317 (9th Cir. 1988) 8

Waggoner v. Dallaire, 767 F.2d 589 (9th Cir. 1985) ..9, 10

Wallace v. Mulholland, 951 F.2d 333 (7th Cir. 1992) 4, 5, 6, 7

RULES

Rule of Civil Procedure 51 8

Rule of Evidence 403 5

No. 94-984

In The

Supreme Court of the United States

October Term, 1994

ORLEAN HOPKINS; JERRY DEWAYNE STANCILL; YOLANDA DELYNN STANCILL; and MELBA LAZENBY-JENKINS, as Administratrix of the Estate of JERRY STANCILL,

Petitioners,

v.

MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; and GEORGE T. HART,

Respondents.

Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that Petitioners' petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case be denied in its entirety.

STATEMENT OF FACTS

The event in question was a detention and subsequent shooting of Petitioners' decedent, Jerry Stancill, by Officer Marc Andaya, a uniformed officer of the Oakland Police Department, on the evening of May 21, 1984. The case was tried before a judge and jury between January 6 and 22, 1993, resulting in a verdict for Respondents.

Officer Andaya testified that he shot Mr. Stancill in self-defense to protect himself from actions by Mr. Stancill that could have lead to Officer Andaya's serious injury or death.

Officer Andaya stopped Mr. Stancill as he was walking toward the Capri Motel in the City of Oakland, California. Earlier in the evening, Officer Andaya had investigated a claim from the motel that Mr. Stancill had made threats against the manager.

When stopped, Mr. Stancill advanced toward Officer Andaya in a "fighting stance." Officer Andaya stepped back and drew his baton to keep Mr. Stancill at distance. As Officer Andaya continued to move back, he tripped and fell on the ground. As he fell, Mr. Stancill took the baton, then beat Officer Andaya as the officer lay on his back. He later beat the officer about the head and arms as well. Only after unsuccessfully attempting to roll away from Mr. Stancill while repeatedly demanding that he desist, did Officer Andaya, fearing he would be hit on the head and rendered unconscious or killed, fire his revolver.

Amazingly, Mr. Stancill did not appear affected by the shots. He pursued Officer Andaya across the street into an Arco gas station. Although he no longer had the

baton, Mr. Stancill continued to advance on the officer. Officer Andaya testified that he felt weak and about to faint. He feared that if he collapsed, Mr. Stancill would take his gun and kill him. He repeatedly warned Mr. Stancill to stay back. As Mr. Stancill advanced, Officer Andaya fired again. Mr. Stancill fell to the ground. Officer Andaya staggered backward into the street and collapsed.

The events, of Officer Andaya being struck by Mr. Stancill while the officer was on the ground and then being pursued by Mr. Stancill across the street into the gas station, were observed by Reverend Floyd Jones and Mr. Bruce Dorsey. Mr. Dorsey, a young man in his twenties, and Reverend Jones gave statements to the police investigators that night and were called as witnesses at trial by Respondents.

Reverend Floyd Jones testified that Mr. Stancill was on top of Officer Andaya and then pursued him across the street. Mr. Dorsey saw Mr. Stancill hit Officer Andaya with a 16-18 inch stick.

Reverend Jones testified that when Officer Andaya entered the gas station, he appeared shaken and was "fighting for his life." He further testified that Mr. Stancill was rushing at Officer Andaya when the fatal shots were fired, and that Officer Andaya then collapsed in the street. Another eyewitness called by Respondents, Norman Borgwardt, testified that Officer Andaya appeared hurt as he backed across the street and went into the gas station.

The only eyewitness called by Petitioners, Greg Lassonde, did not stay at the scene of the incident on May 21,

1984, and never gave a statement to law enforcement investigators. His testimony was often at odds with the physical evidence and the testimony of the three other eyewitnesses who testified.

When the case was first reviewed by the Ninth Circuit Court of Appeal in 1992 (*Hopkins v. Andaya*, No. 89-16368, and reported at 958 F.2d 881), the case was before the court with a limited factual record on review following the District Court's granting of respondents' motion for summary judgment. The subsequent decisions complained of herein (*Hopkins v. Andaya*, No. 93-15463) were before the appellate court with a complete transcript of testimony from the trial.

LEGAL ARGUMENT

A. The Appellate Court's ruling does not conflict with the Seventh Circuit and is a correct application of the Harmless Error Rule.

Petitioners attempt to create an illusory conflict between circuits regarding application of the Harmless Error Rule through circuitous argument and a misapplication of the Appellate Court holding in *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992). These arguments provide no basis for the issuance of a Writ of Certiorari by this Court. *Wallace v. Mulholland, supra*, is factually distinguishable from the case at hand and provides no true analysis of the Harmless Error Rule which Petitioners cite as the foundation for their assignment of error by the Appellate Court.

The court in *Wallace, supra,* addressed an evidentiary quandary which is the direct opposite of that faced by the Appellate Court here. The *Wallace* court addressed the situation in which plaintiff's Motion in Limine was granted at the trial level, thus preventing defendant's use of evidence of plaintiff's psychological condition. The *Wallace* court believed that the evidence was correctly excluded and its analysis ended at that point. In the case Petitioners have brought before this court, however, the exact opposite situation exists and a different analysis is required.

The trial court in the immediate case allowed evidence of plaintiff's prior mental history, including specific acts of conduct, under Federal Rule of Evidence 403. In reaching their unpublished decision, the Appellate Court below found that the District Court erroneously admitted this evidence. However, based upon their review of the extensive pre-trial and trial record, thousands of pages in length, containing testimony from numerous witnesses, including three eyewitnesses to the shooting, that court determined that the admission of this evidence was *not* "more probably than not the cause of the result reached by the jury," using the standard announced in *Jauregui v. City of Glendale,* 852 F.2d 1128 (9th Cir. 1988).

The court was correct in citing *Jauregui, supra,* as the standard for review. As the court stated in *Jauregui*:

> Evidentiary rulings, however, are not reversible absent clear abuse of discretion, *Clady v. County of Los Angeles,* 770 F.2d 1421, 1433 (9th Cir. 1985) (citation omitted), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1516, 89 L.Ed.2nd 915 (1986), and this court

> cannot reverse absent some prejudice. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987) (citation omitted), *cert. denied* ___ U.S. ___ 108 S.Ct. 785, 98 L.Ed.2d 870 (1988).

Id. at p. 1132.

As the court held in *Jauregui*, then, the analysis is two step. First, does the trial court's evidentiary ruling constitute a clear abuse of discretion? If the answer to that question is "yes," then, second, is there some prejudice? The court in *Wallace, supra*, merely took the first step of the analysis. The *Wallace* court found that the evidence was properly excluded at trial and, therefore, made no ruling regarding the prejudicial effect of an erroneous admission of evidence. As such, the holding in *Wallace* is consistent and complimentary to the Ninth Circuit's holding in *Jauregui, supra*. Petitioners' supposed conflict is a mere illusion.

In examining the second prong of the *Jauregui* standard, the court is directed to find "some prejudice," *Ibid.* The court went on to state:

> To show reversible prejudice, a party must demonstrate that the allegedly erroneously evidentiary ruling more probably than not was the cause of the result reached by the court. *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986).

Jauregui, supra, at p. 1133.

Petitioners offer nothing to this court by way of demonstration that the "cause of the result" reached by the jury in the District Court was the admission of evidence regarding Mr. Stancill's mental history. Indeed, the

Appellate Court which, as stated in its opinion, reviewed the entire transcript of the pre-trial and trial proceedings, found no evidence that the jury relied upon Mr Stancill's mental history in rendering any portion of its verdict. The standard, under *Jauregui*, is clear regarding application of the Harmless Error Rule.

Petitioners have offered this court nothing to demonstrate that a conflict exists between circuits regarding application of the Harmless Error Rule. Rather, Petitioners have attempted to create, through misapplication of the law, inconsistencies between two cases (*Wallace* and *Jauregui*) which simply do not exist. The record below does *not* reflect that introduction of Mr Stancill's mental health history more probably than not was the cause of the correct verdict by the District Court jury. Without such a showing, Petitioners' Petition for Writ of Certiorari to this court must be denied in its entirety.

B. Denial of continuance for discovery was within the broad discretionary powers of the trial court and did not result in prejudice to Petitioners.

Petitioners' discussion regarding denial of the continuance of the trial was extremely brief. Petitioners do not contend that the ruling of the Ninth Circuit Court of Appeals is in conflict with any decision of this Court, any decisions of the Circuit Court of Appeals, or any other decision rendered by the Ninth Circuit. At best, Petitioners contend that the decision of the Ninth Circuit is not in accord with the holding of *Martel v. County of Los*

Angeles, 21 F.3d 940, 943 (9th Cir. 1994) which, it should be noted, is a decision of the Ninth Circuit itself.

Petitioners' claim is without merit. In *Martel*, the court annunciated four grounds a moving party must prove in order for a continuance to be granted. One of those grounds requires that Petitioners demonstrate that denial of the continuance resulted in actual or substantial prejudice. The Ninth Circuit specifically ruled in its unpublished memorandum complained of herein that Petitioners did not prove that they had suffered prejudice from denial of the continuance. Thus, the Ninth Circuit Court of Appeals did, in fact, follow the *Martel* guidelines in upholding the District Court's denial of the continuance. *Sablan v. Department of Finance*, 856 F.2d 1317, 1321 (9th Cir. 1988).

C. The law of the case doctrine provides no basis for reversal of the Appellate Court ruling.

Respondents admit that Petitioners correctly cite Federal Rule of Civil Procedure, Rule 51 and *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987) for the proposition that no specific oral objection was required to the court's jury instruction. This instruction required one application of the excessive force standard. However, Petitioners argued below that a prior appellate ruling (*Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992)) required the trial court to instruct the jury that two separate applications of the excessive force standard were required under the law of the case doctrine. Petitioners' argument in this regard is wholly without merit.

As the basis for their contention that two applications of the excessive force standard were required under the law of the case doctrine, Petitioners cite the Appellate Court's *factual analysis* in *Hopkins, supra.* Procedurally, the *Hopkins* case was before the Ninth Circuit Court of Appeal to review the District Court's granting of a Motion for Summary Judgment in favor of Officer Andaya. In analyzing whether any factual dispute existed, the District Court reviewed, in detail, the facts surrounding the shooting of Mr. Stancill. The following passage from the Ninth Circuit's opinion in *Hopkins* is illustrative of this point.

> Appellants (Petitioners herein) contend that there is a triable issue of fact as to whether Andaya used unreasonable force against Stancill. (Footnote omitted.) The question of the reasonableness of force is usually a question of fact for the jury. However, on summary judgment, the court may make a determination as to reasonableness where, viewing the evidence in the light most favorable to *Hopkins*, the evidence compels the conclusion that Andaya's use of force was reasonable. In the unusual circumstances of this case, two troubling *factual issues* lead us to conclude that summary judgment is inappropriate.

Id. at p. 885. (Emphasis added.)

As the Ninth Circuit Court of Appeal stated in *Waggoner v. Dallaire*, 767 F.2d 589 (9th Cir. 1985):

> The law of the case doctrine states that the decision of an Appellate Court on a legal issue 'must be followed in all subsequent proceedings in the same case.' *Planned Parenthood v. Arizona*,

> 718 F.2d 938, 949 (9th Cir. 1983) . . . The law of the case controls, unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or where the evidence on remand is substantially different.

Id. at p. 593.

As announced in *Waggoner*, the law of the case doctrine applies to *legal issues* decided by the court. The Court of Appeals' discussion in *Hopkins*, however, did not reflect decided legal issues, but, rather, was an analysis of facts to determine whether a factual dispute existed. The Appellate Court's analysis of facts leading to their conclusion of law, is not law of the case and, therefore, cannot be used by Petitioners as the basis for a request for review by this court.

Contrary to the assertions made by Petitioners, the law of the case doctrine does not apply in this case. The Court of Appeal, in its published decision regarding the Motion for Summary Judgment, did not direct the trial court that two separate shootings occurred or that two separate applications of the standard for use of deadly force be applied. As such, Petitioners' Petition for Writ of Certiorari from this court must be denied.

CONCLUSION

The Ninth Circuit Court of Appeal performed an extensive and exhaustive review of pre-trial and trial testimony in this case. Following its review, the Court rightly held that Petitioners had failed to demonstrate that admission of mental health evidence had caused the jury to render its defense verdict. The Court used Ninth Circuit precedent again to find that Petitioners herein had failed to demonstrate any prejudice by the denial of a continuance. Finally, Petitioners misplaced use of the law of the case doctrine provides no basis for this court to grant review.

Respondents respectfully request that Petitioners' Petition for Writ of Certiorari be denied in its entirety.

DATED: January 30, 1995

Respectfully submitted,

LARSON & BURNHAM
GREGORY D. BROWN
Co-Counsel for Respondents